NO. 70243-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GRUNDY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's request that the jury be instructed on the inferior degree offense of fourth degree assault.

2. The prosecutor committed misconduct by arguing during closing argument that the crowd's threatening conduct minutes before the punch was not relevant to appellant's self-defense claim.

3. The court violated appellant's right to present a complete defense when it excluded testimony that would have established he was not on private property and thus had no duty to retreat.

4. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant testified he was threatened by a hostile crowd and punched a young man who blocked his way when he attempted to escape. He did not aim for the face and had no experience or understanding of the risk of injury. Viewed in the light most favorable to the defense, did the facts warrant instructing the jury on the lesser offense of fourth-degree assault?

2. A claim of self-defense is judged based on all the facts and circumstances as they appeared to a person in the defendant's position. Many of the crowd's threatening statements and gestures occurred before two police officers arrived at the scene. Did the prosecutor commit

misconduct that denied appellant a fair trial by arguing the events occurring before the officers arrived were not relevant?

3. Some maps of the area suggested appellant may have been in someone's yard when the incident occurred. Fearing jurors might conclude he had a duty to retreat because he was trespassing on private property, the defense sought to introduce evidence establishing the property lines and demonstrating that the location was in the public right of way. Did the exclusion of this evidence violate appellant's constitutional right to present a complete defense?

4. Did the cumulative impact of these errors deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County prosecutor charged appellant Michael Grundy, a Western Washington University student, with one count of second-degree assault. CP 4. Grundy initially pled guilty, but was permitted to withdraw his plea because his attorney had done no investigation into his self-defense claim and had not advised him he would not be eligible for school release. CP 169-73, 182-83.

At trial, the jury found Grundy not guilty of second-degree assault, but guilty of the lesser offense of third-degree assault. CP 106-07. The court

imposed the high end of the standard range, and notice of appeal was timely filed. CP 119-20, 136.

2. Substantive Facts

a. Trial Testimony

Grundy was raised by his grandmother in Seattle's Holly Park neighborhood. RP 474-75. In May 2011, he had just turned 21, was studying accounting at Western Washington University, and had a grade point average of 3.5. RP 474-77. On May 20, Grundy attended a party and had too much to drink. RP 478-79. When the party became too hot and crowded, he left, walked down the street, and leaned on a car for balance as he tried to call a friend to pick him up. RP 479-80, 482.

Unfortunately, the police had been called due to the noise, and the rest of the partiers began to flow into the street. RP 87, 169. Grundy did not notice the three or four young men approaching him until they were up close. RP 483-84. They demanded to know what he was doing and told him to "get the fuck off the car." RP 483-84. When he tried to explain he was only trying to make a phone call, the profanity continued and the young men began to address Grundy, who is black, with racial slurs. RP 484-85. Grundy felt confused, and the next time he looked up, the crowd had grown from three or four to eight. RP 485. The demands that he "get the fuck out

of here" continued. RP 485. In his intoxicated state, Grundy had not realized he was still leaning on the car as he tried to explain. RP 485.

Grundy testified the car was parked on a gravel parking strip in front of a house. RP 493. Defense counsel called an expert and presented two maps as exhibits to show the public right of way and the private property to establish the location was not on private property. RP 303-12; Exs. 5, 6. The court found this evidence irrelevant and struck the testimony. RP 337-47.

Grundy stepped back from the car just as his friend Yonas Ayele arrived. RP 486. Ayele had left the party early and was listening to music in his car while waiting for Grundy. RP 353-54. When he saw a missed call from Grundy on his phone, Ayele walked back toward the party to find him. RP 354. On the way, he saw a large group gathered around Grundy, and heard them tell Grundy to "get the fuck off the car." RP 357. He also heard the crowd use racial slurs directed at Grundy. RP 357.

After Grundy got off the car, Ayele testified, the crowd did not back off. RP 359, 362. Instead, the crowd next demanded he "get the fuck off the block." RP 359. Grundy heard people in the crowd saying, "Let's kick their ass." RP 487.

At this point, another friend of Grundy's arrived, Mulu Gebreselsae. RP 487-99. The crowd began to close in on Grundy, Ayele, and Gebreselsae

with balled up fists. RP 487-89. The demands that Grundy and his friends, all of whom are black, "get off the block" continued. RP 489. Grundy heard people in the crowd muttering to each other "Let's kick their ass," and "We can take these guys." RP 490.

After a second 911 call regarding noise in the street from people leaving the party, the police arrived. RP 89. Grundy testified he knew the police had arrived because of the comments of the crowd. RP 492. Some people stopped harassing him, and some merely got quieter. RP 492, 495-96. Others did not seem to care that police had arrived. RP 496. Grundy was facing the crowd, not the police, and did not dare turn his back to see how far away the police were or what they were doing. RP 493-94. By this time there were 10 to 12 people in the crowd that Grundy was concerned about, and many more standing around watching. RP 497-98.

Officer Freeman testified he arrived to find two groups of young people, a small group in the yard and a larger, more boisterous group in the street spilling over into the sidewalk and corner of the yard. RP 91, 94-95. He testified the small group in the yard was telling the larger group to leave, and the larger group was refusing to do so. RP 96-97. He identified Grundy as part of the larger, more boisterous group that was refusing to leave. RP 96-97. At the request of the smaller group, Freeman began to ask the large crowd to leave. RP 97-98.

The entire crowd, including Grundy and his friends, responded to the officers' commands and began to drift up the street. RP 99, 492, 503. Ayele testified the harassment continued, but Grundy seemed to be trying to brush it off. RP 363. Ayele testified Darius, DJ, Babcock was in the crowd that was harassing Grundy, and Babcock was repeating the same types of things the others were saying. RP 364. Freeman testified he did not hear any name-calling directed at Grundy or any arguing or fighting within the larger group. RP 102, 105. Grundy testified the threats continued, and he heard things like "Are you still here? This guy wants his ass kicked." RP 506-07.

Then someone in the crowd yelled, "Where your friends at now?" RP 507. Grundy looked around and did not see Ayele or Gebreselsae. RP 507. He saw four or five young men from the group move toward him. RP 507. He tried to dart left, but found his escape blocked by Babcock. RP 509-10. Grundy put his head down, swung at Babcock, and fell onto him. RP 509, 515.

Grundy looked up briefly and then ran away from both the crowd and the police. RP 509, 511. When he saw a police car in front of him, he stopped, but then heard footsteps behind him. RP 516. Fearing the crowd was still after him, Grundy kept running until police hit him with a taser. RP 516-17.

Babcock is six feet two inches tall and weighed about 220 pounds at the time, to Grundy's 190. RP 69, 490-91. Babcock denied being involved in any altercation about a car. RP 39. He heard some loud arguing in the crowd but did not hear any threats or see any fighting. RP 44. He testified he was simply listening to the officer tell people to get off the lawn, and the next thing he knew he was on the ground with the officer helping him up. RP 40, 44-45. Officers told him he had been assaulted; X-rays revealed a broken jaw that had to be wired shut. RP 24, 45, 48.

Officer Freeman did not see the punch. RP 108. He was talking with Gebreselsae when he heard a thud and saw Grundy, Babcock and a young woman fall to the ground in front of him. RP 108. Freeman testified he asked Grundy why he punched Babcock and Grundy said, "He hit me first." RP 130.

Officer Horton had arrived on the scene shortly after Freeman. RP 174-75. He was about 30 feet from the crowd, not close enough to hear what Freeman was saying. RP 182-83. He did not hear yelling or see any fighting. RP 183. He saw Babcock and most of the crowd facing Freeman and listening. RP 184-85. He did not specifically recall which direction Grundy was facing. RP 217-18. He did not see Babcock make any sudden moves, but admitted he might not have seen subtle gestures such as a clenched fist. RP 185, 206. About two minutes after Horton got out of his

car, he saw Grundy approach very quickly from about ten feet away, cock his shoulder back, and punch Babcock in the face. RP 186-88, 190. Horton testified Grundy looked up at Freeman before running away. RP 191. Grundy testified he was not trying to hurt Babcock and did not have any idea his punch could cause such a serious injury. RP 513-14, 524.

b. Closing Argument

In closing argument, the prosecutor argued this was retaliation, not self-defense because the officers arrived on the scene two to three minutes before the punch. RP 672-73. He argued, "So something that happened two or three minutes that happened before this or before the police officers even got there to try to control the scene is not relevant to a claim of self-defense." RP 673.

Grundy argued the evidence showed the crowd was growing more and more unreasonable, he was entitled to act on the appearance of danger, and his response of throwing only one punch in his attempt to escape was reasonable. RP 694, 708, 711, 717.

In rebuttal, the prosecutor argued:

> [N]one of the stuff that occurred before the police got on scene can support a reasonable belief that he was about to be injured. An argument that occurred two to two minutes before the police got on scene is absolutely relevant [sic]. . . . Just the fact that you are in an argument doesn't mean that you have a reasonable belief to go breaking everyone's jaw.

RP 721-22. The prosecutor continued:

> But the self-defense issue boils down to what was going on right then. What was, the self-defense issue is not who was arguing with whom or whether or not there was certain language used by certain people or what was going on two or two minutes before. It's whether or not factually things are as Mr. Grundy says. Whether or not factually he turned around and saw DJ moving toward him or whether that did not happen. If the former is true, then perhaps, if Mr. Babcock did come at Mr. Grundy, if that's the truth, then perhaps there could be a discussion about self-defense. That's the issue here that you have to resolved [sic]. Not what was going on five, 10 minutes, a half hour beforehand at the party down below. That's absolutely irrelevant.

RP 722.

c. Jury Instructions and Inquiry

Grundy requested the jury be instructed on the inferior degree offense of fourth degree assault. RP 571. The court initially was inclined to give the instruction, but the prosecutor argued the only lesser offense should be third-degree assault. RP 574-77. Grundy specifically objected to instructing the jury on third-degree assault if it were not also instructed on fourth-degree assault. RP 653. The court denied Grundy's request and instructed the jury only on third-degree assault. RP 646.

During deliberations, the jury submitted an inquiry asking the judge, "Is there a lesser charge available than what we have at this time?" CP 105. Grundy renewed his argument that the jury should be instructed on fourth-

degree assault, but agreed the jury should be told to rely solely on the instructions given. RP 735, 737.

d. Sentencing

At sentencing, the prosecutor asked the court to consider that, by withdrawing his plea and exercising his right to a jury trial, Grundy extended the victim's family's suffering. RP 747. As a result of these delays, Babcock's mother was not able to be at the trial. RP 745-46. The prosecutor argued this was a good thing, because it would have been painful for her to hear the defense vilify her son. RP 745-46. The prosecutor argued for the top of the standard range, opposed any jail alternatives, and requested Grundy be taken into custody immediately, so that he would not be able to finish the semester and the money he spent on his 20 credits would be wasted. RP 748-51.

Despite the jury's acquittal on second-degree assault, the prosecutor argued this was an intentional assault. RP 745-46, 767. The judge appeared to agree, calling it an "opportunistic cheap shot," and one of the more serious third degree assaults the court had seen. RP 766-67. The court noted the system could not make Babcock's injuries go away and did not allow for vengeance. RP 767. The court expressed doubt about the sincerity of Grundy's apology but stated it would base the sentence on facts, not opinion. RP 768.

The court imposed 90 days, the high end of the standard range, but permitted 30 days to be served in jail alternatives. RP 769. The court declared that requiring Grundy to report right away would be more vengeful than necessary and permitted Grundy to report after finishing the semester. RP 769. Grundy requested release on $5,000 bond pending appeal, noting he is indigent. RP 769. The prosecutor argued against any appeal bond, but suggested $75,000 if one were permitted. RP 751. The court ordered an appeal bond of $150,000. RP 770.

C. ARGUMENT

1. GRUNDY WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON FOURTH DEGREE ASSAULT.

A defendant is entitled to have the jury instructed not only on the charged offense, but also on inferior degrees of that offense. RCW 10.61.006; RCW 10.61.003. A defendant is entitled to have the jury fully instructed on the defense theory of the case whenever there is evidence to support it. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Wash. Const. art I, § 3.

a. This Court Should Review This Issue De Novo.

A refusal to instruct on lesser offenses supported by the evidence violates not only the statutory right but also the right to due process under the Fourteenth Amendment. Beck v. Alabama, 447 U.S. 625, 637, 638 n.14, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (in capital case, due process requires instruction on lesser offense when supported by evidence); Berroa v. United States, 763 A.2d 93, 95 & n.4 (D.C. Ct. App. 2000) (applying rule in non-capital case); Vujosevic v. Rafferty, 844 F.2d 1023, 1027-28, 1028 n.1 (3d Cir. 1988) (same); Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984) (same); State v. Oldroyd, 685 P.2d 551, 555 (Utah 1984) (same).

A defendant is entitled to an instruction on an inferior degree offense when: (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense;" (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. Fernandez-Medina, 141 Wn.2d at 454. The first two factors present legal questions, while the third factor is the factual component. Id. at 455.

A trial court's refusal to give a jury instruction based on the evidence is generally reviewed for abuse of discretion, whereas the refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136

Wn.2d 767, 771-72, 966 P.2d 883 (1998). However, when an otherwise discretionary decision is based solely on application of a court rule or statute to particular facts, the issue is one of law reviewed de novo. State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994). A trial court's interpretation of case law is also reviewed de novo. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). Furthermore, whether a constitutional right has been violated is a question of law reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." Id. (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

De novo review is appropriate in this case because the trial court denied the lesser offense instruction by applying the facts of Grundy's case to the legal standard from the case law in determining whether the instruction was warranted. Tatum, 74 Wn. App. at 86. Moreover, it is a question of law whether the failure to give lesser offense instruction violated Grundy's constitutional right to due process. Iniguez, 167 Wn.2d at 280.

b. The Jury Should Have Been Instructed on Fourth Degree Assault Because There Was Evidence Grundy Lacked the Requisite Mental State for Higher Degrees of Assault.

The legal components of the test are satisfied in this case. Fourth-degree assault is a lesser degree of second-degree assault and the various

assault statutes proscribe only one offense, namely, assault. State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979); State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008). Where a crime is a lesser degree offense, the court need only address the factual prong to determine whether a defendant is entitled to a lesser degree instruction. State v. Ieremia, 78 Wn. App. 746, 755 n.3, 899 P.2d 16 (1995). The parties below argued solely the factual prong of the analysis. RP 571-584, 610-22, 643-46.

A requested lesser degree instruction is required if the jury could have concluded the defendant committed the inferior degree offense instead of the higher degree offense. Ieremia, 78 Wn. App. at 755. An accused person has an unqualified right to have the jury pass on a lesser offense if there is "'even the slightest evidence'" he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 163 64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wn. 273, 276 77, 60 P. 650 (1900)).

Therefore, a court must view the evidence as a whole in the light most favorable to the party requesting the instruction. Fernandez- Medina, 141 Wn.2d at 456. Although there must be affirmative evidence supporting the instruction, this evidence need not come from the party requesting the instruction. Id. An instruction requested by the defense may be warranted even if it contradicts the defense theory of the case. Id. at 456-58.

The jury could have found Grundy committed only fourth-degree assault here because it could have found the degree of harm was purely accidental. Fourth-degree assault is an intentional assault not amounting to any of the higher degrees of assault. RCW 9A.36.041. The higher degrees of assault require a guilty mental state regarding the scope of the harm inflicted: Second-degree assault requires the person "recklessly" inflict substantial bodily harm. RCW 9A.36.021(a). Third-degree assault requires the person act with criminal negligence in causing "bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(f). When there is an intentional assault, but the degree of harm inflicted was entirely accidental, the assault is only fourth-degree.

Instruction on fourth-degree assault was warranted because Grundy presented evidence he had no guilty mind as pertains to the scope of the harm. Grundy admitted he intentionally hit Babcock. RP 513. But he did not aim for his face. RP 513-14. He could not even see where his punch landed. RP 529. On the contrary, Grundy testified he put his own head down and threw a wild punch. RP 513-14. His only goal was to get Babcock out of his way so he could escape. RP 514. Not being experienced with boxing or other fighting sports, Grundy was unaware of the likelihood of significant injury. RP 513, 524. This evidence supports an inference that

Grundy intentionally assaulted Babcock, as required for fourth-degree assault, but that hitting him in the face and the scope of the harm were an accident, unaccompanied by any evil intent.

In response, the State may argue a punch to the face is at a minimum criminally negligent as a matter of law. See State v. R.H.S., 94 Wash. App. 844, 847, 974 P.2d 1253, 1256 (1999) ("[A]ny reasonable person knows that punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm."). This case is inapplicable. R.H.S. involved a challenge to the sufficiency of the evidence, thus the evidence was viewed in the light most favorable to the State. Id. By contrast, this case involves the failure to give requested jury instructions, which requires viewing the evidence in the light most favorable to Grundy. When viewed in that light, Grundy's testimony that he did not aim for the face, RP 513, is sufficient to warrant instruction on fourth-degree assault.

The failure to instruct the jury on fourth-degree assault prejudiced Grundy. Reversal is required when a defendant is entitled to instruction on a lesser degree but does not receive it. See Parker, 102 Wn.2d at166 (where defendant has right to lesser offense instruction, appellate court barred from holding defendant not prejudiced by failure to submit instruction to jury). Even beyond the presumption of prejudice, the record in this case shows the jury's clear reluctance to convict Grundy of a felony

and its desire to consider a lesser offense. CP 105 (jury inquiry whether there is "a lesser charge available than what we have at this time?"). The failure to instruct on fourth-degree assault requires a new trial.

2. THE PROSECUTOR'S CLOSING ARGUMENT MISSTATED THE LAW AND DEPRIVED GRUNDY OF THE BENEFIT OF THE LAW OF SELF-DEFENSE.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). "A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury." Id. (citing State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). When the prosecutor mischaracterizes the law and there is a substantial likelihood the misstatement affected the verdict, the right to a fair trial is violated. Id. (citing State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988)). That is what occurred here.

The prosecutor repeatedly told the jury the threats and harassment Grundy suffered from the crowd in the minutes leading up to the punch were irrelevant to his self-defense claim. RP 672-73, 721-22. This argument contradicts the law that juries must consider all the facts and circumstances as they appeared to the defendant in deciding whether his conduct was reasonable self-defense. State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d

548, 557 (1977). This argument was misconduct that deprived Grundy of the benefit of his defense and requires reversal.

a. The Prosecutor Misstated the Law and Misled the Jury By Arguing the Crowd's Threatening Conduct Minutes Earlier Was Irrelevant to Grundy's Self-Defense Claim.

It has been well-established for more than thirty years that, when evaluating a self-defense claim, the jury must consider the defendant's conduct "in light of all the facts and circumstances," as they appeared to the defendant at the time. Wanrow, 88 Wn.2d at 235; see also State v. Hoffman, 116 Wn.2d 51, 110, 804 P.2d 577 (1991); State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (in self-defense case, jury must be instructed to consider all the facts and circumstances known to the defendant at the time). This includes events remote in time to the actual conflict: "[T]he jury is to consider the defendant's actions in light of *all* the facts and circumstances known to the defendant, even those substantially predating the killing. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495, 504 (1993) (emphasis added) (citing Allery,101 Wn.2d at 594, Wanrow, 88 Wn.2d at 234-36).

In Wanrow, the court reversed a murder conviction because the instructions limited the jury's consideration to circumstances "at or immediately before the killing." 88 Wn.2d at 234. The court explained, "Respondent's knowledge of the victim's reputation for aggressive acts was

gained many hours before the killing and was based upon events which occurred over a period of years." Id. at 238. The court concluded, "Under the law of this state, the jury should have been allowed to consider this information," in determining whether Wanrow acted in self-defense. Id. In short, circumstances predating the killing by weeks and months were "entirely proper, and in fact essential, to a proper disposition of the claim of self-defense." Id. at 235.

Despite this well-established rule, the prosecutor argued here that events occurring two or three minutes before the punch were not relevant to Grundy's self-defense claim. RP 673. He argued nothing that happened before the police arrived could support a reasonable belief Grundy was about to be injured, and the prior threatening conduct was "absolutely irrelevant." RP 721. This argument directly contradicts the holding of Wanrow. 88 Wn.2d at 235.

The prosecutor's argument also distorted the law of self-defense by tying the timing of the threatening conduct to the difference between self-defense and retaliation. The prosecutor repeated twice that Officer Freeman was on the scene for two to three minutes and did not see anyone in physical danger. RP 670-71. The third time he referenced the two-to-three minutes of police presence, he followed up this argument with the point that "[R]etaliation is not self-defense. The defendant doesn't get to call it self-

defense or the defense doesn't get to claim self-defense, I should rephrase, if there was something that happened, some argument that happened a couple of minutes before and nobody has really cooled off yet and it's kind of a retaliation type scenario. You don't get to retaliate under the cloak of self-defense." RP 672-73. The prosecutor then again directly declared, "[S]omething that happened before this or before the police officers even got there to try to control the scene is not relevant to a claim of self-defense. Retaliation is not self-defense." RP 673.

This theme deprived Grundy of the benefit of the law of self-defense. The mere timing of the threat is not the difference between self-defense and retaliation. See Janes, 121 Wn.2d at 239. In Janes, the court found prior abuse was relevant to a self-defense claim, explaining, "[T]he jury is to inquire whether the defendant acted reasonably, given the defendant's experience of abuse." Id. To make this determination, the jury needs to learn of the "defendant's perceptions and the circumstances surrounding the act." Id. Here, the fact that some of the threatening conduct occurred before the police arrived is relevant to how Grundy perceived other more recent events. It is relevant to his claim of self-defense. But under the prosecutor's argument, the jury was likely to reject his claim out of hand based on the elapsed two or three minutes. The prosecutor's repeated misstatements of the law of self-defense were misconduct.

b. The Misstatements of the Law Were So Pervasive and Central to the State's Argument that No Instruction Could Have Cured the Prejudicial Effect.

Prosecutorial misconduct is reversible error when the misconduct is so flagrant and ill intentioned as to be incurable by instruction to the jury. Walker, 164 Wn. App. at 737. Even if an instruction might have cured an isolated misstatement, the cumulative effect of repeated prejudicial misconduct may require reversal. Id. This was not isolated misconduct on an unimportant point of law. Self-defense was the fulcrum of Grundy's case. The prosecutor repeatedly misstated the law and severely undercut the self-defense instructions. This made it difficult, if not impossible, for the jury to apply the correct law to the facts and deprived Grundy of a fair trial.

Argument that consistently misleads the jury regarding the law supporting the defense can amount to reversible misconduct, even without objection at trial. Walker, 164 Wn. App at 731-39. The prosecutor in Walker made arguments, previously condemned by Washington courts, that minimized the burden of proof beyond a reasonable doubt and misled the jury regarding Walker's defense. Id. at 731-32, 735. The court reversed, despite the lack of objection below. Id. at 739. First, the Walker court explained the physical evidence left room for reasonable doubt and the case essentially came down to credibility. Id. at 738. Thus, the nature of the evidence created a situation in which "the prosecutor's improper arguments

could easily serve as the deciding factor." Id. Additionally, the Walker court noted the prosecutor did not make only one or two isolated comments. Id. On the contrary, the prosecutor used the improper comments, "to develop themes throughout closing argument." Id.

Like Walker, this case also essentially came down to credibility. The prosecutor admitted as much in closing argument. RP 722. He argued the question is "[W]hether or not factually things are as Mr. Grundy says. Whether or not factually he turned around and saw DJ moving toward him or whether that did not happen." RP 722. This is the type of case where prosecutorial argument could easily be the deciding factor.

As in Walker, the misstatement of the law of self-defense was not an isolated comment, but was a theme throughout closing and rebuttal. The prosecutor repeatedly focused on the two or three minutes that the officers said elapsed between their arrival and the punch. RP 670, 671, 672, 673, 721, 722. He argued anything that happened before their arrival was irrelevant. Id. He argued the elapsed time proved this was retaliation, not self-defense. Id.

This argument directly undermined the crux of Grundy's self-defense claim, which rested on the increasing hostility of the crowd. That hostility began before the officers arrived, but continued more subtly afterwards. RP 483-90, 506-07. The jury could not properly evaluate the reasonableness of

Grundy's actions without considering the earlier stages of the growing wave of animosity he faced. The earlier threats informed Grundy's interpretation of later comments and the crowd's movement. Grundy was entitled to have the jury consider all these facts and circumstances. Wanrow, 88 Wn.2d at 235.

But the prosecutor's argument was likely to convince the jury none of that mattered. The jury was likely to be confused because the jury instructions on self-defense mention the facts and circumstances "at the time," and the prosecutor's argument made it appear that only the circumstances at the immediate time of the punch were relevant. The prosecutor's argument essentially foreclosed Grundy's self-defense claim and was incurable misconduct that requires reversal.

c. Grundy's Attorney Was Ineffective In Failing To Object To Prosecutorial Argument That Deprived Him Of The Benefit Of His Defense.

Alternatively, if this Court concludes this issue was not preserved, Grundy was denied his right to effective assistance of counsel when her attorney failed to object to the misconduct. The federal and state constitutions guarantee all defendants the right to effective representation at trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (citing U.S. Const. amend. 6; Const. art. 1, § 22). Ineffective assistance of

counsel is a constitutional error that may be considered for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The two-part test set forth in Strickland is used to determine ineffective assistance of counsel. Thomas, 109 Wn.2d at 225-26. Regarding the first prong, the court must determine if counsel's performance was deficient. Id. Defense counsel's representation is deficient if falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Under the second prong, the court must reverse if it finds a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694).

Here, defense counsel's performance was unreasonably deficient when he failed to object to the State's closing argument that misled the jury regarding the law pertaining to Grundy's defense. If this Court finds the error could have been cured by instruction to the jury, counsel was ineffective in failing to request such an instruction to ensure the jury would give proper consideration to the defense theory of the case. Additionally, counsel was ineffective in failing to preserve the error for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (Failure to preserve error can constitute ineffective assistance and justifies examining

the error on appeal); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel's performance, the outcome of the trial would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice requires reversal whenever the attorney's error undermines confidence in the outcome. Id. That confidence is undermined here. Grundy's self-defense claim came down to credibility. The prosecutor agreed that if Grundy was believed, this may be a case of self-defense. RP 722. Without curative instruction, argument encouraging the jury to disregard substantial evidence of self-defense was likely to tip the scales in favor of a guilty verdict.

3. GRUNDY'S RIGHT TO PRESENT A COMPLETE DEFENSE WAS VIOLATED WHEN HE WAS NOT PERMITTED TO PUT ON EVIDENCE REBUTTING THE SUGGESTION HE MAY HAVE HAD A DUTY TO RETREAT.

This incident occurred in the gravel parking strip between the grass yard of a private home and the paved road. RP 356-57, 493. The angle of the bushes shown in the exhibits suggested that the area may have been part of the homeowner's property. RP 341-43; Exs. 3, 5, 6, 7, 8, 9, 10, 11. Part of the conflict involved residents of the house telling others to leave. RP 96-

97. Because Grundy presented evidence of self-defense, the jury was instructed there is no duty to retreat when a person "is in a place where that person has a right to be." CP 102.

Counsel was concerned the jury might believe the gravel parking strip was part of the private property surrounding the home. RP 307, 312, 337-39. To establish Grundy's right to stand his ground and defend himself, he offered expert testimony and exhibits showing the property lines and the public right of way. RP 303-12; Exs. 5, 6. The court excluded the evidence in violation of Grundy's right to present a complete defense.

a. Relevant Defense Evidence Must Be Admitted Unless the State Shows a Compelling Countervailing Interest Such as Disrupting the Fairness of the Trial.

Criminal defendants have the constitutional right to present evidence in their own defense. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. In light of this essential constitutional due process protection, the trial court's exclusion of defense evidence is subjected to a higher level of scrutiny. Jones, 168 Wn.2d at 719-20. Courts review de novo whether exclusion of defense evidence violated the right to present a defense. Id.

To protect the right of accused persons to defend themselves, courts have declared relevant defense evidence is admissible unless the State can

show a compelling interest to exclude it. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Defense evidence may not be excluded solely on the basis of procedural or evidentiary rules. Darden, 145 Wn.2d at 621-22. If the court believes defense evidence is barred by such rules, "the court must evaluate whether the interests served by the rule justify the limitation." Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The restriction on defense evidence must not be arbitrary or disproportionate to its purpose. Id.

Once it is shown that the evidence is minimally relevant, the jury must be allowed to hear it unless the State can show it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622. When evidence is of high probative value, "no state interest can be compelling enough to preclude its introduction." Jones, 168 Wn.2d at 720. Error in excluding relevant defense evidence or limiting cross-examination is presumed prejudicial unless no rational juror could have a reasonable doubt as to guilt. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

b. Evidence Showing Grundy Was Not on Private Property Was Relevant to his Self-Defense Claim.

Whether Grundy was in a public right of way or on private property was relevant to whether he had a right to stand his ground and defend himself. Evidence is relevant when it has any tendency to make any fact at issue more or less likely. ER 401. Relevance depends on "the circumstances of each case and the relationship of the facts to the ultimate issue." State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citations omitted). "Facts tending to establish a party's theory of the case will generally found to be relevant." Id. (citing State v. Mak, 105 Wn.2d 692, 703, 718 P.2d 407 (1986).

This evidence should have been permitted because it related directly to the circumstances in which the allegations arose. See Jones, 168 Wn.2d at 717, 721 (defense's account of events "contemporaneous with an alleged criminal act" was highly relevant and should not have been excluded under rape shield statute). Grundy testified he was leaning on a car parked on the gravel. RP 493. The officers testified the group Grundy was part of was spilling over onto the yard. RP 91. Evidence showing the property lines was necessary to show Grundy was in a place where he had a right to be and thus had no duty to retreat.

c. Neither the State Nor the Court Cited Any Compelling Interest Requiring Exclusion of this Evidence.

Once counsel explained the relevance of this evidence to the duty to retreat aspect of the self-defense claim, the court was bound to admit it unless it was so prejudicial it would "disrupt the fairness of the fact-finding process." Darden, 145 Wn.2d at 622. The court was required to balance the state's interest against Grundy's need for the information, and admit the evidence unless the state's interest outweighed Grundy's need. Id.

Instead of applying the balancing test, the court second-guessed counsel's decisions about how to present relevant evidence and failed to give deference to the constitutional right to present a defense. The court excluded the evidence because no witness testified Grundy was in the yard, and the property lines would not prove Grundy's location. RP 339-40, 345. The court told defense counsel he could ask a witness whether Grundy was in the yard, and excluded the evidence on the grounds that it was not relevant and was a waste of time. RP 345-46.

There was no significant waste of time because most of Johnson's testimony had already been presented. RP 303-12. Moreover, even if there were significant waste of time, that assessment does not outweigh Grundy's constitutional right to present a complete defense. Under ER 403, evidence that is cumulative or a waste of time may be excluded. But "ER 403 does

not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense." State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987) (citing 5 K. Tegland, Washington Practice, § 105; United States v. Wasman, 641 F.2d 326 (5th Cir. 1981)).

Courts must safeguard the right to present a defense "'with meticulous care.'" State v. Maupin, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). That meticulous care requires reversal in this case. Grundy was deprived of the ability to show that his right to defend himself was in full force because he was in a place where he had a right to be. His conviction should be reversed.

4. CUMULATIVE ERROR DEPRIVED GRUNDY OF A FAIR TRIAL.

Even if, individually, the errors complained of above would not warrant reversal, their cumulative effect does. Reversal is required when the cumulative effect of errors produces a trial that is fundamentally unfair. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2011). In Venegas, the court found the trial court unreasonably excluded relevant defense evidence. Id. at 523. The prosecutor also misstated the burden of proof in closing argument. Id. at 523-25. Finally, the court failed to weigh the prejudicial impact of other misconduct evidence before admitting it. Id. at

525-26. The court found each error significant and concluded the cumulative impact on the trial was severe enough to warrant reversal. Id. at 527.

Here, the three errors, each significant in their own right, also interacted to compound the prejudice to Grundy's ability to present a defense. Grundy's self-defense claim was unfairly undermined from two different sides when the court excluded relevant evidence, and the prosecutor improperly argued the evidence Grundy did present was irrelevant. Grundy's alternative argument for fourth-degree assault was precluded by the court's refusal to instruct the jury on this lesser offense. Assuming, for the sake of argument, these errors did not individually warrant reversal, their cumulative impact rendered Grundy's trial unfair and requires reversal.

D. CONCLUSION

Grundy's defense was hamstrung when he was denied instruction on a lesser degree offense, the prosecutor repeatedly misstated the law pertaining to his self-defense claim, and the court excluded evidence relevant to show he had no duty to retreat. Alone or cumulatively, these errors require reversal of Grundy's conviction.

DATED this _____ day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

_____
JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant